IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-707

ARLETTA UPTEGROVE; LORI ANN UPTEGROVE and RICHARD WAYNE UPTEGROVE, minors, by their guardian ad litem, ARLETTA UPTEGROVE; and ARLETTA UPTEGROVE, Executrix of the Estate of Edwin Wayne Uptegrove,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners, ARLETTA UPTEGROVE, LORI ANN UPTEGROVE, and RICHARD WAYNE UPTEGROVE, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 21, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit presented for review by this petition is reported at 600 F.2d 1248 (9th Cir. 1979). A copy of the opinion, *Uptegrove v. United States*, is attached hereto as an Appendix. No opinion was rendered by the District Court for the Southern District of California.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals sought to be reviewed was filed and entered on May 21, 1979. A timely petition for rehearing was denied by the court of appeals on August 6, 1979, and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the mere presence of plaintiffs' decedent, a naval officer on furlough, on an Air Force aircraft, which crashed as a result of the negligence of a non-military government employee, rendered the death of plaintiffs' decedent "incident to service," thereby barring a claim for wrongful death under the Federal Tort Claims Act.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved in this petition. Each is reproduced in full in the Appendix hereto:

10 U.S.C. § 802 Art. 2
28 U.S.C. § 1346(b)
28 U.S.C. §§ 2671-2680
38 U.S.C. § 351
38 U.S.C. §§ 410(a), 410(b)(2)

STATEMENT OF THE CASE

Factual Background

This action arises out of the death of Edwin Wayne Uptegrove, plaintiffs' decedent, who was a Navy Lieutenant killed in an aircraft crash near Seattle, Washington on March 20, 1975. The facts are uncontroverted. At the time of his death, Lt. Uptegrove was on leave from his ship in the Philippines and had been on leave since the morning of the preceding day. He was not required to return to his ship until April 9. Lt. Uptegrove was returning home to visit his wife and children in San Diego. He was riding as a space-available passenger on an Air Force C-141 and was seated in the passenger compartment, which is a separate area from the crew compartment. Lt. Uptegrove was not a pilot and had no duties or responsibilities for the operation of the aircraft. Lt. Uptegrove was not under military orders, nor did his military duties require him to be on the aircraft.

The flight had originated in Japan and the aircraft was to land at McChord Airbase near Seattle, Washington. Approximately nine hours after leaving Japan the aircraft was approaching Seattle from the northwest. At about 10:46 p.m., Federal Aviation Administration air traffic controllers at Seattle identified the aircraft on their radar scopes. These controllers were employees of the FAA and were stationed at Seattle Air Route Traffic Control Center, Auburn, Washington. Seattle Center provides air traffic control service for all aircraft in the Seattle area, both military and civilian. Allan L. Cunningham was the FAA employee directing the aircraft, which was identified as "MAC 40641". His supervisors were FAA employees Alan D. Worrell and William M. Hawkes. Neither Mr. Cunningham nor his supervisors was a member of the military service and all were employed in a non-military facility operated by the FAA.

As the aircraft entered Seattle Center's area, the FAA air traffic controllers began directing its course and altitude to position it for landing by taking it off of established airways, around Seattle's congested airspace. The aircraft was directed by the controller, using the radar scope, to fly various directions and to descend to lower altitudes. At 10:52 p.m., Mr. Cunningham cleared MAC 40641 to descend to 10,000 feet above mean sea level, and it reported reaching that altitude at approximately 10:56 p.m. During that four minute period, the FAA controller had assumed control over an additional aircraft, a navy plane with radio call sign "Navy 28323," and cleared it to descend to 10,000 feet. Only three seconds after MAC 40641 reported level at 10,000 feet, the FAA controller told MAC 40641 to maintain *5,000* feet. At that time terrain features along the projected flight path of MAC 40641 were well

above 5,000 feet. At approximately 10:58 p.m., MAC 40641 crashed into Mt. Constance at an altitude of 7,150 feet, killing all persons on board. The FAA controller, Mr. Cunningham, has stated that he believed he had issued the descent clearance to the aircraft designated Navy 28323. At the time, place and altitude of the crash, the visibility for the crew of the aircraft was one-fourth of a mile in snow. Multi-layered clouds from 1,000 feet mean sea level to 15,000 feet mean sea level covered the area of the crash and it is unlikely that any surface features could have been visually detected by the crew.

Procedural History

The plaintiffs in this action are Arletta Uptegrove, the decedent's widow, and Lori Ann and Richard Wayne Uptegrove, the decedent's children. Plaintiffs filed a timely and proper administrative claim with the United States, which claim was rejected. They commenced this action on May 5, 1976, in the District Court for the Southern District of California by filing their complaint and naming the following defendants: United States of America, Allan L. Cunningham, Alan D. Worrell, and William M. Hawkes.

On July 8, 1976, all defendants, appearing through the U.S. Attorney for the Southern District, filed a "Motion to Dismiss or, in the Alternative, Motion for Summary Judgment." The district court, at the hearing on defendants' motions on November 8, 1976, granted the United States' motion for summary judgment and denied its motion to dismiss. The individual defendants' motion to dismiss was granted.

On May 16, 1977, plaintiffs filed an appeal from the district court judgment granting the motion of the United States for summary judgment. On May 21, 1979, the Ninth Circuit Court of Appeals affirmed the decision of the district court. A timely petition for rehearing was denied by the Ninth Circuit on August 6, 1979.

REASON FOR GRANTING THE WRIT

The Decision Of The Ninth Circuit Conflicts With Decisions Of This Court With Respect To Whether Injury Or Death Suffered By A Serviceman While He Is On Furlough And Not On Active Duty, And is Caused By A Non-Military Government Employee, Is Nevertheless "Incident To Service," Thereby Precluding Recovery Against The Government.

The death of Lt. Uptegrove occurred while he was on furlough and en route to visit his family in San Diego, California. It was caused by the negligence of a non-military government employee, and was totally unrelated to Lt. Uptegrove's military service.

The court of appeals noted that, while on the C-141, Lt. Uptegrove would be subject to discipline for violating provisions of the Uniform Code of Military Justice. The court of appeals further found that Lt. Uptegrove would not have been present on the military aircraft, but for his status as a serviceman. Therefore, the court concluded, his death was "incident to service," thereby precluding tort recovery against the United States under the doctrine set forth by this Court in *Feres v. United States*, 340 U.S. 135 (1950).

The rationale underlying the decision of the Ninth Circuit Court of Appeals is directly contradictory to that of three cases decided by this Court, including the case on which the Ninth Circuit relied: *Brooks v. United States*, 337 U.S. 49 (1949); *Feres v. United States*; and *United States v. Brown*, 348 U.S. 110 (1954).

The result in Lt. Uptegrove's case should have been dictated by *Brooks v. United States*, rather than *Feres v. United States*. Therefore, the decision of the court of appeals should be reversed.

A. This Case Is Factually Analogous To *Brooks v. United States* In Which Recovery Was Allowed.

In 1949, this Court decided *Brooks v. United States*, 337 U.S. 49. The pertinent facts in *Brooks* were remarkably similar to the undisputed facts in the present case, yet the result was directly opposite. In *Brooks*, the soldiers were allowed to recover. In the present case, recovery was denied by the Ninth Circuit.

In *Brooks*, two brothers were on leave when their automobile was struck by a negligently operated army truck, driven by a civilian government employee. One of the brothers was killed and the other injured, and actions were brought against the United States. This Court held that the actions could be maintained, because the harm suffered by the soldiers was not "incident to their service."

Like the soldiers in *Brooks*, Lt. Uptegrove was on furlough, under compulsion of no military orders and on no military mission. Lt. Uptegrove's death, which was caused by the negligence of a non-military government employee was "not

caused by [his] service except in the sense that all human events depend on what has already transpired" 337 U.S. at 52.

While plaintiffs in *Brooks* were allowed to recover, this Court, one year later, denied recovery to three other servicemen in *Feres v. United States*, 340 U.S. 135 (1950). *Feres* also involved servicemen who were injured by governmental negligence. In denying recovery, this Court concluded that *their* injuries *were* "incident to" their military service and, therefore, excepted from recovery under the Tort Claims Act. Thus was the "*Feres* doctrine" born.

The facts in the *Feres* case and the case presently under consideration are quite dissimilar. In *Feres*, the claimants were on active duty and *not* on furlough at the time of injury; the *Feres* claimants were injured on base or in a military hospital; and the *Feres* claimants were injured as a result of negligence of other members of the Armed Forces.

This Court explained the basis for the conflicting results in *Brooks* and *Feres* as follows:

> The actual holding in the Brooks Case can support liability here only by ignoring the vital distinction there stated. The injury to Brooks did not arise out of or in the course of military duty. *Brooks was on furlough*, driving along the highway, *under compulsion of no orders or duty and on no military mission* . . . Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders.

Feres v. United States, 340 U.S. at 146. (Emphasis added.)

In a later case, this Court again emphasized the distinction between the *Brooks* and *Feres* decisions:

> The *Brooks* case held that servicemen were covered by the Tort Claims Act where the injury was not incident to or caused by their military service . . . In that case, *servicemen on leave were* negligently *injured* on a public highway *by a government employee* driving a truck of the United States. . . .
>
> The *Feres* decision *involved three cases, in each* of which the injury for which compensation was sought under the Tort Claims Act, occurred while *the serviceman was on active duty and not on furlough*; and *the negligence* alleged in each case *was on the part of other members of the Armed Forces.*

United States v. Brown, 348 U.S. 110, 111-12 (1954). (Emphasis added.)

The Ninth Circuit Court of Appeals appears to have ignored these important distinctions. In its decision, it states

> Uptegrove took leave from his ship, stationed in the Philippines, on March 19, 1975 . . . [H]is presence on the aircraft was a result of the fact that he was *on active duty* in the United States Navy.

600 F.2d at 1249. (Emphasis added.)

In fact, Lt. Uptegrove was *not* on active duty, as that term is used in *Feres* and *Brooks*, but was on *leave* from his duties and

was not scheduled to return to his ship for a period of several weeks.[1]

In addition, Lt. Uptegrove's death was caused by the negligence of a non-military government employee. Given these factual circumstances, this case is governed by *Brooks* rather than *Feres* and recovery should, therefore, have been allowed.

B. Lt. Uptegrove's Presence In A Military Aircraft At The Time Of His Death Should Not Preclude Recovery.

It is readily apparent that the only significant factual difference between this case and *Brooks v. United States* is that plaintiffs in *Brooks* were riding in a private vehicle, whereas plaintiffs' decedent was riding as a space-available passenger in a military aircraft.

The Ninth Circuit appears to have given great weight to this distinction, however, stating that:

> 1) Lt. Uptegrove's "presence on the aircraft was a result of the fact that he was on active duty in the United States Navy." and

[1] As pointed out by the Second Circuit Court of Appeals in Camassar v. United States, 531 F.2d 1149 (2d Cir. 1976) military personnel "continue in active duty status even when they are on liberty or on leave which are attributes of active duty, and they remain subject to ultimate military control." Id. at 1151 n. 2. However, this is not the sense in which the term "active duty" was used by this Court in drawing the distrinction between "active duty" and "furlough" status, which led to the contrary results in *Brooks* and *Feres*. The servicemen in *Brooks* were on "active duty" in this broad sense, but were nevertheless allowed to recover damages.

> 2) "While on the C-141, Uptegrove was subject to the command of the military flight crew, and could be disciplined before a military court for violating provisions of the Uniform Code of Military Justice."

Uptegrove v. United States, 600 F.2d at 1249.

Both of these rationales are groundless, and the first (*i.e.*, Lt. Uptegrove would not have been on the aircraft but for his military status) conflicts with the result reached in the above-cited decision of this Court, *United States v. Brown,* 348 U.S. 110 (1954).

Plaintiff in *Brown* was a discharged veteran who had suffered an injury to his knee while on active duty. He underwent surgery in a Veterans Administration hospital seven years after his release from the Armed Services, and his knee was further injured as a result of an allegedly defective tourniquet. Plaintiff sued the United States under the Federal Tort Claims Act. The district court held that plaintiff's sole remedy was under the Veterans Act and dismissed his complaint under the Tort Claims Act. The Court of Appeals for the Second Circuit reversed, and this Court affirmed the court of appeals' decision, holding that Mr. Brown's claim was governed by *Brooks* rather than *Feres*. The dissenting opinion urged the same rationale as was relied upon by the Ninth Circuit in the present case - *i.e.*, that plaintiff would not have been treated in a veterans hospital were it not for his prior military status:

> But for his army service this veteran could not have been injured in the veterans hospital as he was eligible and admitted for treatment there solely because of war service which gave him veteran status.

Id. at 114. (Black, J., Dissenting.)

This argument was recognized and rejected by the majority:

> Respondent was there, of course, because he had been in the service and because he had received an injury in the service. And the causal relation of the injury to the service was sufficient to bring the claim under the Veterans Act. But, unlike the claims in the Feres Case, this one is not foreign to the broad pattern of liability which the United States undertook by the Tort Claims Act.

Id. at 112.

Thus, the Ninth Circuit's statement that Lt. Uptegrove's "presence on the aircraft was a result of the fact that he was on active duty in the United States Navy" gives no support to its conclusion that Lt. Uptegrove's death was "incident to service" and, therefore, noncompensable under *Feres*.

The Ninth Circuit's second rationale - *i.e.*, the fact that Lt. Uptegrove was subject to the Uniform Code of Military Justice - similarly fails to support its "incident to service" conclusion.

The Uniform Code of Military Justice, codified at 10 U.S.C. § 802 Art. 2 provides, in pertinent part:

> The following persons are subject to this chapter:
>
> (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the

> armed forces, from the dates when they are required by the terms of the call or order to obey it.
>
> . . . .
>
> (4) Retired members of a regular component of the armed forces who are entitled to pay.
>
> (5) Retired members of a reserve component who are receiving hospitalization from an armed force.
>
> . . . .

It is apparent, therefore, that *all* current members of the Armed Forces, whether on active duty or on furlough, and even certain retired members, are subject to the Uniform Code of Military Justice. Plaintiffs in *Brooks*, and perhaps even the plaintiff in *Brown*, would have been included within the definition of those so subject, yet they were allowed recovery. The fact that Lt. Uptegrove was subject to the Uniform Code of Military Justice at the time of his death does not render that death "incident to service," as that term is defined for purposes of application of the *Feres* doctrine.[2]

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[2] The Ninth Circuit, quoting from Stencel Aero Eng'r Corp. v. United States, 431 U.S. 666 (1977), also made reference to recovery under the Veterans' Benefits Act as a basis for the *Feres* decision, and for the denial of recovery under the Tort Claims Act in the present case:

> . . . Second, the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any

(Footnote 2 continued on page 14.)

CONCLUSION

The result reached in this case by the Ninth Circuit Court of Appeals is in conflict with three decisions of this Court - *Brooks v. United States*, *Feres v. United States*, and *United States v. Brown*.

Lt. Uptegrove's death, like that of plaintiff in *Brooks*, occurred while he was on leave and not subject to military orders nor on any military mission. Further, his death, as in *Brooks*, was a result of the negligence of a non-military, government employee.

Lt. Uptegrove's presence as a space-available passenger on a military aircraft does *not* render his death automatically "incident to service," any more than did plaintiff's presence in a veterans hospital render the injury "incident to service" in *United States v. Brown*.

Footnote 2 continued

negligence attributable to the Government. . . .
Uptegrove v. United States, 600 F.2d at 1250.

It should be noted that recovery under the Veterans' Benefits Act does not automatically preclude recovery under the Tort Claims Act. In United States v. Brown, 348 U.S. 110 (1954), plaintiff was receiving benefits under the Veterans' Act and was also held to be entitled to recover under the Tort Claims Act.

Also, 38 U.S.C. § 410(b)(2) provides that any money received by a surviving spouse or child of a serviceman, pursuant to a cause of action for damages for death of that serviceman, is deducted from the benefits that would otherwise be payable to those survivors under 38 U.S.C. § 410(a). Therefore, there would be no "double recovery" paid to Lt. Uptegrove's survivors, were they allowed to proceed against the Government under the Tort Claims Act.

In that it conflicts with the conclusions reached by this Court in the above-cited cases, the decision of the Ninth Circuit Court of Appeals should be reversed.

WHEREFORE, petitioners pray that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted

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November, 1979

APPENDIX

10 U.S.C. § 802. Art. 2. Persons subject to this chapter

The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces. from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to this chapter.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the Environmental Science Services Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of

international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: the Canal Zone, Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the following: the Canal Zone, Puerto Rico, Guam, and the Virgin Islands.

28 U.S.C. § 1346. United States as defendant

. . . .

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

. . . .

28 U.S.C. § 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U.S.C. § 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award,

compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. § 2673. Repealed.

28 U.S.C. § 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. § 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 U.S.C. § 2676. Judgment as bar

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

28 U.S.C. § 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

28 U.S.C. § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement

officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal Law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

38 U.S.C. § 351. Benefits for persons disabled by treatment or vocational rehabilitation

Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Veterans' Administration, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to

or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28, United States Code, or, on or after December 1, 1962, enters into a settlement or compromise under section 2672 or 2677 of title 28, United States Code, by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

38 U.S.C. § 410. Deaths entitling survivors to dependency and indemnity compensation

(a) When any veteran dies after December 31, 1956, from a service-connected or compensable disability, the Administrator shall pay dependency and indemnity compensation to such veteran's surviving spouse, children, and parents. The standards and criteria for determining whether or not a disability is service-connected shall be those applicable under chapter 11 of this title.

(b) . . . .

(2) If a surviving spouse or a child receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the death of a veteran described in paragraph (1) of this subsection, benefits under this chapter

payable to such surviving spouse or child by virtue of this subsection shall not be paid for any month following a month in which any such money or property is received until such time as the total amount of such benefits that would otherwise have been payable equals the total of the amount of the money received and the fair market value of the property received.

. . . .

Arletta UPTEGROVE, Lori Ann Uptegrove and Richard Wayne Uptegrove, minors, by their guardian ad litem, Arletta Uptegrove; and Arletta Uptegrove, Executrix of the Estate of Edwin Wayne Uptegrove, Plaintiffs and Appellants,

v.

UNITED STATES of America, Allan L. Cunningham, Alan D. Worrell; William M. Hawkes, Defendants and Appellees.

No. 77-1723.

United States Court of Appeals,
Ninth Circuit.

May 21, 1979.

Rehearing Denied Aug. 6, 1979.

Marshall L. Foreman, Jr., Luce, Forward, Hamilton & Scripps, Donald L. Salem, San Diego, Cal., for plaintiffs and appellants.

Michael E. Quinton, Asst. U. S. Atty., San Diego, Cal., for defendants and appellees.

Appeal from the United States District Court for the Southern District of California.

Before CHAMBERS and HUG, Circuit Judges, and KELLEHER,* District Judge.

HUG, Circuit Judge:

The appellant, Arletta Uptegrove, individually and as guardian ad litem for her two minor children, appellants Lori and Richard Uptegrove, brought this action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, against the United States and individually against Allan Cunningham, Alan

*The Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

Worrell and William Hawkes, FAA air traffic controllers, for the death of her husband and their father, Navy Lieutenant Edwin Uptegrove. Uptegrove was killed when an Air Force C-141 transport, on which he was a military space available passenger, crashed into the side of Mount Constance near Seattle, Washington, due to the alleged negligent conduct of the three FAA air traffic controllers. The trial judge granted summary judgment in favor of the United States, for failure to state a claim upon which relief could be granted, on the basis of the *Feres* doctrine. This doctrine which was first announced in *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), precludes recovery under the Federal Tort Claims Act by a military person for injuries sustained during an activity incident to his military service. The court held that Lt. Uptegrove's death was incident to his military service and that only the status of the plaintiff, and not that of the tortfeasor, can be considered in determining the applicability of the *Feres* doctrine. We agree and therefore affirm.[1]

Facts

Uptegrove took leave from his ship, stationed in the Philippines, on March 19, 1975. He traveled to Japan, where he boarded an Air Force C-141 jet transport bound for McChord Air Force Base near Seattle, Washington. His ultimate destination was his home in San Diego, California, where he planned to visit his family while on leave. Uptegrove boarded the transport as a military space available passenger; his presence on the aircraft was a result of the fact that he was on active duty in the United States Navy. While on the C-141, Uptegrove was subject to the command of the military flight crew, and could be disciplined before a military court for violating provisions of the Uniform Code of Military Justice.

[1] The trial court dismissed the action against Cunningham, Worrell and Hawkes because it lacked personal jurisdiction over those defendants. The appellants do not appeal that order.

After a long flight across the Pacific Ocean, the C-141 approached McChord Air Force Base, under conditions of very poor visibility. FAA Air Traffic Controller Cunningham in the Seattle Air Route Traffic Control Center directed the transport to descend to an altitude of 10,000 feet above sea level at 10:52 P.M. Four minutes later, and after the C-141 reported its altitude at 10,000 feet, Cunningham requested that it descend to, and maintain, an altitude of 5,000 feet. Less than two minutes later, the transport collided with Mount Constance at an altitude of 7,150 feet. All aboard were killed.

Discussion

The appellants make two arguments. The first is that the trial judge erred in finding that Uptegrove's death arose out of activity incident to his military service. The second argument is that the *Feres* doctrine is not applicable here because appellants' claim is based upon the negligence of the civilian employees of the government, rather than the negligence of its military personnel, and thus there is no threatened interference with military discipline and no reason for the application of the *Feres* doctrine. We disagree.

By enacting the Federal Tort Claims Act, the United States has consented to suits against it for the wrongful conduct of its employees acting within the scope of their employment "under circumstances where . . . [it], if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred". 28 U.S.C. § 1346(b). In *Feres*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152, the Supreme Court recognized an exception to the government's general liability under the FTCA "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service". *Id.* at 146, 71 S.Ct. at 159.

Appellants contend that Uptegrove's death did not arise out of or in the course of activity incident to military service because he was on leave and was not traveling pursuant to military orders, but merely as a voluntary passenger on a military plane.

In a case very similar to this one, we held that an action under the FTCA was barred by *Feres*. In *Archer v. United States*, 217 F.2d 548 (9th Cir. 1954), *cert. denied*, 348 U.S. 953, 75 S.Ct. 441, 99 L.Ed. 745 (1955), an action was brought under the FTCA by the parents of a United States Military Academy cadet, who was killed while on leave in the crash of an army plane on which he was a military space available passenger. There the court stated:

> The Trial Court was undoubtedly correct in holding that a cadet riding under military discipline on an army plane under control of a superior officer has no claim under the Act for injury sustained through whatever cause. This principle would not vary even though the service man were on leave and whether he were on the plane voluntarily or by command. He was in line of duty. Under such circumstances, his parents could not recover for his death.

Id. at 551. The court noted that he was subject to military discipline on the military plane, even though riding voluntarily and the court further stated:

> A "cadet" being "transported" in a "United States Army Plane," which was operated by an employee of the United States Army, has no valid claim against the government for an accident causing him damage. Nor has anyone such a claim for his death.

Id. at 552. This holding has been followed in other courts. *See Herreman v. United States*, 476 F.2d 234 (7th Cir. 1973); *Homlitas v. United States*, 202 F.Supp. 520 (D.Or. 1962); *Fass v. United States*, 191 F.Supp. 367 (E.D.N.Y. 1961).

Here, as in *Archer*, Uptegrove was subject to military discipline while he was on the C-141. Under *Archer*, the fact that he was on leave and voluntarily boarded the transport does not alter the fact that the activity was incident to his military service.

In their second argument, appellants contend that the FAA employees were civilian employees and that the policy reasons for the *Feres* doctrine do not apply because there is no threatened interference with military discipline. A number of factors have been mentioned by the Supreme Court as the basis for the *Feres* doctrine. They are well summarized in *Stencel Aero Eng'r Corp. v. United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), the Court's most recent pronouncement on the subject. There the Court stated:

> First, the relationship between the Government and members of its Armed Forces is "distinctively federal in character," [*Feres*] 340 U.S. at 143, 71 S.Ct. 153, citing *United States v. Standard Oil Co.,* 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947); it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury. Second, the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory "no fault" compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government. A third factor was explicated in *United States v. Brown,* 348 U.S. 110, 112, 75 S.Ct. 141, 99 L.Ed. 139 (1954), namely, "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . .. "

Id. at 671-72, 97 S.Ct. at 2058. The fact that all of these considerations are not present in a particular case does not mean that the *Feres* doctrine should not be applied. *United States v. Lee,* 400 F.2d 558 (9th Cir. 1968), *cert. denied,* 393 U.S. 1053, 89

S.Ct. 691, 21 L.Ed.2d 695 (1969). The Supreme Court has never indicated that *Feres* should be limited only to situations in which interference with military discipline is threatened. *Id.* at 564.

In *Lee,* a sergeant in the Marine Corps was a passenger aboard a plane being operated by the Military Air Transport Service. The complaint alleged that the plane crashed as a result of the negligence of employees of the FAA, as in this case. The court held the complaint must be dismissed, rejecting the argument that the *Feres* doctrine should not apply where the alleged negligence is that of civilian, rather than military employees. The court stated:

> The Supreme Court and Circuit cases are consistent in holding that the status of the deceased or injured person controls. If his injury or death was connected with the military, the claimant may not recover under the Tort Claims Act. . . .

Lee, 400 F.2d at 562.

It had been argued before the Court in *Lee* that the *Feres* doctrine had been eroded by later cases. The continued vitality of *Feres,* as found in the *Lee* case, has been recently confirmed in *Stencel Aero Eng'r Corp. v. United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977).

We hold, therefore, that the trial judge properly considered only Uptegrove's military status, not that of the tortfeasor, and that there is no material issue of fact that his death arose out of activity incident to his military service. The *Feres* doctrine bars the appellant's FTCA action.

Affirmed.